In the Supreme Court of the United States

78-1657

No. ——
Spring Term, 1979

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA HUMAN RELATIONS COMMISSION,
Petitioner

vs.

PITTSBURGH PRESS COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Pennsylvania Human Relations Commission, Petitioner herein, requests that this Court issue a Writ of Certiorari in order to review the judgment of the Supreme Court of Pennsylvania, entered in this case on January 24, 1979.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is unofficially reported at 396 A.2d 1187, and is set forth in the appendix (App. C, *infra*). There is no official report of the Supreme Court's decision. The opinion of the Commonwealth Court of Pennsylvania is officially reported at 31 Pa. Commonwealth Ct. 218, unofficially reported at 367 A.2d 263, and printed in the appendix (App. B, *infra*). The Pennsylvania Human Relations Commission's findings of fact, conclusions of law, decision and final order are not officially reported, but are set forth in the appendix (App. A, *infra*). Together the findings, decision and final order constitute the Commission's decision which was reviewed by the Commonwealth Court and the Pennsylvania Supreme Court.

JURISDICTION

The decision of the Supreme Court of Pennsylvania was entered on January 24, 1979. No petition for reargument was filed, and the time for filing such a petition has expired.

The jurisdiction of this Court to review the decision of the Supreme Court of Pennsylvania upon writ of certiorari is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

A. United States Constitution Amendment I

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

B. Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. 955 *et seq.*, Section 5 (a), 5 (e), 5 (g) and Section 9:

Section 5 (a): It shall be an unlawful discriminatory practice, unless based on a bona fide occupational qualification . . . (a) [f]or any employer because of the race, religious creed, ancestry, age, sex, national origin, or non-job related handicap or disability of any individual to refuse to hire . . . such individual . . . if the individual is the best able and most competent to perform the services required.

Section 5 (e): For any person, whether or not an employer, employment agency, labor organization or employe, to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, or to obstruct or prevent any person from complying with the provisions of this act or any other issued thereunder, or to attempt, directly or indirectly, to commit any act declared by this section to be unlawful discriminatory practice.

Section 5 (g): For any individual seeking employment to publish or cause to be published any advertisement which specifies or in any manner expresses his race, color, religious creed, ancestry, sex or national origin, or in any manner expresses a limitation or preference as to the race, color, religious creed, ancestry, age, sex or national origin of any prospective employer.

Section 9. Procedure: Any individual claiming to be aggrieved by an alleged unlawful discriminatory practice may make, sign and file with the Commission a verified complaint, in writing, which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful discriminatory practice complained of, and which shall set forth the particulars thereof and contain such other information as may be required by the Commission. The Commission upon its own initiative or the Attorney General may, in like manner, make, sign and file such complaint. Any employer whose employes, or some of them, hinder or threaten to hinder compliance with the provisions of this act may file with the Commission a verified complaint, asking for assistance by conciliation or other remedial action and, during such period of conciliation or other remedial action, no hearings, orders or other actions shall be taken by the Commission against such employer.

After the filing of any complaint, or whenever there is reason to believe that an unlawful discriminatory practice has been committed the Commission shall make a prompt investigation in connection therewith.

If it shall be determined after such investigation that no probable cause exists for crediting the allegations of the complaint, the Commission shall, within ten days from such determination, cause to be issued and served upon the complainant written notice of such determination, and the said complainant or his attorney may, within ten days after such service, file with the Commission a written request for a preliminary hearing before the Commission to determine probable cause for crediting the allegations of the complaint. If it shall be determined after such investigation that probable cause exists for crediting the allegations of the complaint, the Commission shall immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion. The members of the Commission and its staff shall not disclose what has transpired in the course of such endeavors: Provided, That the Commission may publish the facts in the case of any complaint which has been dismissed, and the terms of conciliation when the complaint has been adjusted, without disclosing the identity of the parties involved.

In case of failure so to eliminate such practice or in advance thereof, if in the judgment of the Commission circumstances so warrant, the Commission shall cause to be issued and served a written notice, together with a copy of such complaint as the same may have been amended, requiring the person, employer, labor organization or employment agency named in such complaint, hereinafter referred to as respondent, to answer the charges of such complaint at a hearing before the Commission at a time and place to be specified in such notice. The place of any such hearing shall be in

the county in which the alleged offense was committed.

The case in support of the complaint shall be presented before the Commission by one of its attorneys or agents. The respondent may file a written, verified answer to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony. The complainant may likewise appear at such hearing in person or otherwise, with or without counsel, and submit testimony. The Commission or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent shall have like power to amend his answer. The Commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and be transcribed.

If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action including but not limited to hiring, reinstatement or upgrading of employes, with or without back pay, admission or restoration to membership in any respondent labor organization, or selling or leasing specified commercial housing upon such equal terms and conditions and with such equal facilities, services and privileges or lending money, whether or not secured by mortgage or otherwise for the acquisition, construction, rehabilitation, repair or maintenance of commercial housing, upon such equal terms and conditions to any person discriminated against or all persons as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance. When the respondent is a licensee of the Commonwealth, the Commission shall inform the appropriate State licensing authority of the order with the request that the licensing authority take such action as it deems appropriate against such licensee. An appeal from the Commission's order shall act as a supersedeas and stay such action by the state licensing authority until a final decision on said appeal. If, upon all the evidence, the Commission shall find a respondent has not engaged in any such unlawful discriminatory practice, the Commission shall state its findings of fact, and shall issue and cause to be served on the complainant an order dismissing the said complaint as to such respondent.

The Commission shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder. Three or more members of the Commission shall constitute the Commission for any hearing required to be held by the Commission under this act. Any complaint filed pursuant to this section must be so filed within ninety days after the alleged act of discrimination. Any complaint may be withdrawn at any time by the party filing the complaint.

QUESTIONS PRESENTED

1. Does a "Situation-Wanted" newspaper advertisement directly specifying the race, color, religious creed, ancestry, age, sex, or national origin of the job seeker, constitute speech protected in its entirey by the First Amendment to the United States Constitution?

2. Does an order issued by a state agency lacking summary contempt power, requiring a newspaper to cease and desist a pattern and practice of publishing *in toto* "Situation-Wanted" advertisements, directly specifying the race, color, religious creed, ancestry, age, sex or national origin of the job seeker, constitute an impermissible prior restraint on protected speech?

3. Did the Pennsylvania Supreme Court correctly balance the First Amendment interests of job seekers who wish to publish advertisements such as those described in Questions One and Two, *supra,* against the interests of the state and federal governments in prohibiting racial and other unlawful discrimination in employment?

4. Is a state statute, which prohibits an individual seeking employment from publishing any advertisement which "specifies or in any manner expresses his race, color, religious creed, ancestry, age, sex, or national origin", susceptible of interpretation consistent with the First Amendment?

STATEMENT OF THE CASE

The instant action was commenced on March 11, 1975, when the Pennsylvania Human Relations Commission (hereinafter "Commission"), the agency charged with enforcement of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §955, *et seq.*, initiated a complaint pursuant to said Act at Docket No. E-8528 against Pittsburgh Press Company (hereinafter "Press"). The complaint alleged that Press "maintains a pattern and practice of aiding and abetting the doing of an unlawful discriminatory act" in violation of Section 5 (e) of the Pennsylvania Human Relations Act, 43 P.S. §955 (e), by publishing advertisements alleged to be unlawful under §5 (g) of said Act, 43 P.S. §955 (g).

A hearing was held before the Commission, at which written stipulations of fact were received into evidence and oral argument was heard. After submission of briefs by Press and the Commission staff counsel, the Commission issued its findings of fact, conclusions of law, decision and final order requiring Press to cease and desist from publishing "situation-wanted advertisements, the contents of which are prohibited by §5 (g) of the [Pennsylvania Human Relations] Act, [43 P.S. 955 (g)]."

In its conclusions of law, the Commission expressly considered and rejected the First Amendment defenses proffered by Press:

3. Such advertisements are not protected by the First Amendment to the Constitution of the United States.

4. The conduct of the respondent in engaging in a pattern and practice of publishing such situation wanted ads is not protected by the First Amendment to the Constitution of the United States.

The Commonwealth Court, by order and opinion issued on July 21, 1977, reversed the final order of the Commission. The Court held that Section 5 (g) of the Pennsylvania Human Relations Act did not significantly further the Commonwealth's concededly substantial interest in eradicating employment discrimination and necessarily had the effect of significantly impairing the flow of "legitimate" and truthful commercial information, in violation of the First Amendment. Thus, the Court reasoned that the Commission's statutory authority which prohibited Press from publishing such advertisements was an unconstitutional legislative incursion upon First Amendment protected rights.

The Supreme Court of Pennsylvania, by opinion and order filed January 24, 1979, affirmed the Commonwealth Court's reversal of the Commission. The Pennsylvania Supreme Court's decision was based upon federal law, specifically, the First Amendment. The Court explicitly rejected the Commission's argument that the case is controlled by *Pittsburgh Press Company vs. Pittsburgh Commission on Human Relations,* 413 U.S. 376, 37 L.Ed. 2d 669, 93 S.Ct. 2553 (1973) "(Press I)". The Majority held, *inter alia,* that:

Press I does not stand for the proposition that prior restraint may be imposed on commercial speech even though that speech does not propose an illegal transaction.

No application for reargument has been filed. Under Pa. R.A.P. 2542, the time for filing any application for reargument expired on February 8, 1979.

REASONS FOR GRANTING THE WRIT

A. The Pennsylvania Supreme Court Incorrectly Concluded That "Situations Wanted" Advertisements, Which Directly Specify the Race, Color, Religious Creed, Ancestry, Age, Sex or National Origin of the Job Seeker, Constitute Speech Which Is Protected in Its Entirety by the First Amendment to the United States Constitution

In *Pittsburgh Press Co. vs. Pittsburgh Commission on Human Rights, et al.*, 413 U.S. 376 (1972) (hereinafter "Press I"), this Court sustained the validity of a Pittsburgh human rights ordinance which, *inter alia*, proscribed sex segregated "help-wanted" advertisements.[1] In the case sub judice, a virtually identical

[1] The Pittsburgh ordinance in issue in *Press I* provided, in pertinent part, that it was an unlawful employment practice, "except where based upon a bona fide occupational exemption certified by the Commission:

> (a) For any employer to refuse to hire any person or otherwise discriminate against any person with respect to hiring . . . because of . . . sex.
>
> (e) For any 'employer', employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to 'employment' or membership which indicates any discrimination because of . . . sex.
>
> (j) For any person, whether or not an employer, employment agency or labor organization, to aid . . . in the doing of any act declared to be an unlawful employment practice by this ordinance . . ."

provision of the Commonwealth of Pennsylvania's Human Relations Act was held to be unconstitutional by the Commonwealth's Supreme Court on the basis that the statutory provision in issue constituted a prior restraint upon rights protected by the First Amendment. In so doing, the Commonwealth failed to correctly apply the clearly controlling precedent of *Press I, supra.*

The Court's 1973 decision in *Press I* stands as a clear demarcation of this Court's "commercial speech doctrine", as introduced in *Valentine v. Chrestensen,* 316 U.S. 52 (1942). While indicating that purely commercial speech might be entitled to limited First Amendment protection, this Court in *Press I* held that advertisements proposing illegal commercial transactions are entitled to no such protection (413 U.S. at 389). The holding of *Press I* has not been diluted by subsequent commercial speech decisions. Therefore, the decision of the Pennsylvania Supreme Court upon which this petition is predicated decides a federal question of substance never determined by this Court, and in so doing misapplies this Court's decision in *Press I.*

This provision of the Pittsburgh ordinance is virtually identical to the relevant provisions the Pennsylvania Human Relations Act, in issue in this case (*Press II*) which are cited in part Pgs. 3-7, *supra.*

Thus, while the issue in this case involves Pittsburgh Press' status as one who aids or abets the doing of an unlawful practice under this Act (§5(e) of the Pennsylvania Human Relations Act), the ratio decidendi of the Pennsylvania Supreme Court's decision struck down §5(g) itself as an unlawful prior restraint on free speech.

The advertisements here in issue clearly violate Section 5(g) of the Pennsylvania Human Relations Act. For a representative sample, see 31 Pa. Commonwealth Ct. at 223, cited at pp. 11a, 13a-14a, Appendix B. For First Amendment purposes, these advertisements are indistinguishable in terms of content from those held unlawful and unprotected in *Press I*. Those help wanted advertisements proposed the illegal activity of employment discrimination; these situation wanted advertisements invite through proscribed references to race and other forbidden data the very same illegal activity.

Decisions following *Press I*, particularly *Virginia State Board of Pharmacy et al. vs. Virginia Citizens Consumer Council Inc., et al.*, 425 U.S. 749 (1976); *Linmark Associates Inc. vs. Township of Willingboro*, 431 U.S. 85 (1977), and *Bates vs. State Bar of Arizona*, 433 U.S. 350 (1977), have emphasized the societal interest in the free flow of truthful and legitimate commercial information. However, none of these opinions can be read to extend First Amendment protection to information which serves no conceivable purpose other than a patent appeal to prejudice. The underlying illegal activity of employment discrimination is no less illegal when solicited by a prospective employee than when committed by an employer. Thus, the Pennsylvania Supreme Court's reliance upon the post *Press I* "commercial speech" cases is an inapposite and unwarranted extension of First Amendment protection to commercial situation-wanted advertisements calculated to foster discriminatory employment practices. Conversely, the *Press II* rationale erodes this Court's decision in *Press I* in a manner inconsistent with the commercial speech doctrine even as enunciated in this Court's post *Press I* decisions.

B. The Pennsylvania Supreme Court Incorrectly Concluded That the Human Relations Commission's Final Order Constituted an Impermissible Prior Restraint on Protected Speech

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The Commission's final order (see Appendix A, pp. 9a-10a) in pertinent part directs the Press to cease publication of ". . . situation wanted advertisements, the contents of which are prohibited by Section 5(g) of the Act." In both its brief and oral argument before the Pennsylvania Supreme Court, the Commission made clear that it did not interpret its final order to require that any advertisement go unpublished because of the inclusion of a prohibited item of information; the order simply directed that prohibited words and phrases (e.g. "white woman", "young man") be replaced by neutral job-related terms (e.g. "person" "experienced worker"). The Commission's final order is thus improperly categorized as a prior restraint. Decisions of this Court relating to prior restraint (e.g. *Near vs. Minnesota*, 283 U.S. 697 (1931), and *New York Times Co. vs. United States*, 403 U.S. 713 (1971)), have struck down total prohibitions against publication and thus do not support the definition of prior restraint adopted by the Pennsylvania Supreme Court.

Further, the Commission lacks summary contempt power (43 P.S. §960); its orders are not self-enforcing. Appellate court review will thus be available

prior to the issuance of any order of enforcement in all cases. Significantly, an identical provision in the Pittsburgh Human Relations Ordinance was noted by this Court in *Pittsburgh Press I*, note 14, 413 U.S. at 390-1, as relevant to this very issue.

Finally, even if the Commission's final order were viewed as a prior restraint, a recent decision of this Court suggests that the prohibition against prior restraints does not apply with the same force in the context of commercial speech as it does in more traditionally protected speech areas, if indeed it applies at all (see *Virginia Pharmacy Board vs. Virginia Consumer Council*, footnote 24, 425 U.S. at 771-2). *See also, Bates vs. State Bar of Arizona*, 433 U.S. 350 (1977).

In *Virginia Pharmacy Board*, commercial speech is described as being more durable than other kinds, and arguably less susceptible to chilling. In the present context, it is doubtful that a suggestion by a Pittsburgh Press classified ad-taker that substitutions, such as those described above be made, would deter placement of advertisements by persons seeking employment solely on the basis of merit.

C. The Pennsylvania Supreme Court Did Not Correctly Balance the Interests of Job Seekers Wishing To Publish Forbidden Data Against the Substantial State and Federal Interest in Preventing Employment Discrimination

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In striking down Section 5(g), the Pennsylvania Supreme Court's analysis did not assess the competing

interests which prior decisions of this Court establish as controlling.

While the Court below did correctly note the job seeker's First Amendment right to freely express his or her employment qualifications, including education, work experience, and abilities; insufficient consideration was given to the fact that a job seeker's race, sex, religious creed, etc. are not job-related characteristics, and that Pennsylvania employers are forbidden by the Human Relations Act from making hiring decisions based on these factors.[2] In short, no rationale for permitting inclusion of the specific proscribed data was advanced, by either the Pennsylvania Supreme Court or Pittsburgh Press. Instead, the Court held, in effect, that the First Amendment's protection extends not only to legitimate commercial information, as it must, but also to data which serves no purpose other than to further a patent appeal to prejudice. No decision of this Court requires that the First Amendment be so used as a device for the advancement of employment discrimination.

The reliance of the Court below on *Linmark vs. Willingboro Township*, 431 U.S. 85 (1977), is misplaced. While it correctly noted that the record in this case is silent as to the actual impact of the advertisements in question, as was the record in *Linmark* regarding the impact of the ordinance there at issue; the court failed to note an important distinction: "white

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[2] Even those extremely limited instances involving "bona fide occupational qualifications" can be expressed in neutral, job related terms (i.e., a wet nurse or sperm donor can indicate prior experience by referring to prior experience in the field).

flight" is an objectively quantifiable phenomenon. A community's racial composition and property values may be precisely measured. Employment discrimination is infinitely more elusive. In the instant situation, if discrimination does result from the portions of the advertisements in question, it will be silent, and for all practical purposes undetectable.

Furthermore, unlike the situation in *Linmark*, where the Township sought to ban *all* "For Sale" signs, the Commission's final order does not leave the job seeker without access to the "situation wanted" columns of the Press. No limitation is placed on advertisements which confine themselves to legitimate, employment-related data.

Most importantly, the Commission's position in this situation is not one of support for a paternalistic blanket-type prohibition such as this Court rejected in both *Linmark* and *Virginia Pharmacy*.

In *Linmark* this Court reached the real fear of the Township: that receivers of information might act on the information received, to the detriment of the Township. The Commission, likewise, fears that receivers of information will act on it, to the detriment of all who seek equal, merit-based employment opportunity in the Commonwealth, opportunity which the Commission is mandated by statute to safeguard.

Nor has the Commission adopted the position taken by the Pharmacy Board in *Virginia Pharmacy* of attempting to withhold legitimate commercial information essential to informed decision making by consumers. Rather, the Commission wishes to insure that *only* job-related, legitimate information will reach prospective employers.

D. The Pennsylvania Supreme Court Erred in Failing To Devise a Narrow Interpretation of Section 5 (g) Which Is Consistent With the Requirements of the First Amendment

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Assuming *arguendo* that a broad reading of §5 (g) contravenes the First Amendment, the Pennsylvania Supreme Court's failure to construe §5 (g) in a narrower but constitutional manner is inconsistent with this court's treatment of the overbreadth doctrine as applied to the "commercial speech" area.

The "commercial speech" in issue in this case involves a potential for unlawful employment discrimination which is not subject to regulation save at the time the situation wanted advertisement is placed. Persons placing such advertisements solicit employment from society as a whole. Absent a subsequent contact from a prospective employer, they have *no way* of ascertaining whether or not they were ever considered for any given employment opportunity. Thus, such acts of employment discrimination will go unmonitored unless all reasonable means of securing unbiased consideration of situation wanted advertisements are assured.

The provisions of §5 (g) of the Pennsylvania Human Relations Act are designed to assist in achieving the unbiased consideration of such advertisements by prospective employers. If situation wanted advertisements do not indicate proscribed characteristics such as race, color, religious creed, ancestry, age, sex, or national origin, the prospective employers will be

limited to the job-related considerations set forth in the advertisement when making initial selections and undertaking initial contacts with prospective employees. Once contact is initiated, the potential for assessment and review of employer conduct against non-discrimination policy exists (i.e., at that time the prospective employee, for the first time, knows that an actual employment selection procedure was triggered by a situation wanted advertisement). The only way in which, and point in time at which, the significant societal interest in non-discriminatory employment practices can be imposed upon this form of job seeking is through regulation of the content of the "situation wanted" advertisement at the time of placement. *Cf. Bates vs. State Bar of Arizona,* 433 U.S. 350 (1977).

This Court, in *Bates, supra,* clearly indicated that the First Amendment protection of commercial speech was not being extended to unlawful practices such as deceptive or misleading or otherwise illegal advertisements. *See Bates, supra* at 366.

A prospective employer can have no lawful interest in the race, color, religious creed, ancestry, age, sex, or national origin of a prospective employee especially when the prospective employee does not know that such factors are being considered. This is not information of import within the *Bates* rationale. *See also, Regents of the University of California v. Bakke,* U.S. , 98 S.Ct. 2733 (1978). Even employers engaged in proper remedial "affirmative action" can do no more than advertise their status as equal opportunity employers.

The statutory language in issue is not a blanket prohibition upon "situation wanted" advertising and is appropriately construable in a manner consistent with protection of the relevant elements in such advertisements.

> "Since advertising is linked to . . . [economic] . . . well being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulations." (Citations omitted.) *Bates, supra,* at page 381.

Experience in the employment discrimination area has demonstrated the necessity for the vigorous and reasonable regulation of employment practices as a means of eliminating historic prejudices and preconceptions from all aspects of employment. Section 5 (g) is clearly amenable, should the Court deem it necessary, to a narrowing construction which would protect the individual's right to seek employment based upon job-related considerations, rather than invidious stereotypes.

The statutory goal of equal employment opportunity is of the highest societal priority and deserves, *at least,* a reasonable accomodation with First Amendment principles.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania in this case.

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APPENDIX A

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS
COMMISSION

Docket No. E-8528

PENNSYLVANIA HUMAN RELATIONS
COMMISSION,
Complainant

vs.

PITTSBURGH PRESS COMPANY,
A CORPORATION,
Respondent

HISTORY OF THE CASE, FINDINGS OF FACT, CONCLUSIONS OF LAW, COMMISSION'S DECISION AND FINAL ORDER

HISTORY OF THE CASE

The Pennsylvania Human Relations Commission (hereinafter the "Commission") initiated a complaint on March 11, 1975 at Docket No. E-8528 charging that the Respondent Pittsburgh Press Company "main-

tains a pattern and practice of aiding and abetting the doing of an unlawful discriminatory act prohibited by Section 5 (g) of the Pennsylvania Human Relations Act in that Respondent prints in its situation-wanted column advertisements which specify or express the race and/or sex of the individual placing the advertisement." The complaint charged that this conduct was in violation of Section 5 (e) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §951 et seq., (the "Act"). Section 5 (e) of the Act provides in its pertinent part:

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such association or corporation or except where based upon applicable security regulations established by the United States or the Commonwealth of Pennsylvania . . . for any person, whether or not an employer, employment agency, labor organization or employe, to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice . . .

Section 5 (g) of the Act provides that is unlawful for any individual seeking employment to publish or cause to be published any advertisement which specifies or in any manner expresses his race, color, religious creed, ancestry, age, sex or national origin, or in any manner expresses a limitation or preference as to the race, color, religious creed, ancestry, age, sex or national origin of any prospective employer.

An investigation by the Commission staff determined that there was probable cause to credit the allegations of the complaint, whereupon the Commission endeavored to eliminate the unlawful pattern and practice complained of by conciliation. Conciliation having failed, the Commission convened a public hearing on August 6, 1975 pursuant to Section 9 of the Act. The Hearing Panel consisted of Commissioner Elizabeth M. Scott, Chairperson of the Panel, and Commissioners Robert Johnson Smith and John P. Wisniewski. Gary L. Lancaster, Esquire, Assistant General Counsel in the Pittsburgh Regional Office of the Commission, presented the case in support of the complaint. Robert H. Shoop, Jr., Esquire, of Thorpe, Reed, and Armstrong, represented the Respondent. Elisabeth S. Shuster, Assistant General Counsel in the Harrisburg Headquarters Office of the Commission sat as Legal Advisor to the Hearing Panel.

Counsel for the parties entered into written stipulations which were entered into the record at the public hearing along with exhibits A1 through A33 and B1 through B7.

The Hearing Panel, upon consideration of oral argument and the record and the briefs submitted subsequent to the hearing by counsel for the parties, unaminously recommended that the full Commission find in favor of the Complainant.

FINDINGS OF FACT

1. The Complainant is the Pennsylvania Human Relations Commission, an administrative agency established by the Pennsylvania Human Relations Act

and charged with effectuating the purposes of the Act, and empowered to initiate complaints charging violations of the Act.

2. The Respondent is the Pittsburgh Press Company, a corporation located at 34 Boulevard of the Allies, Pittsburgh, Pennsylvania.

3. The Respondent publishes a daily newspaper of general circulation called the Pittsburgh Press (hereinafter "the Press").

4. The Press accepts and publishes in its pages so-called "situation-wanted" advertisements from individuals seeking employment.

5. The Press accepts and publishes these advertisements in the language as submitted by these individuals and without regard to whether the content of the advertisement conforms with Section 5 (g) of the Act.

6. Many of these advertisements specify or in some manner express the race, color, religious creed, ancestry, age, sex or national origin of the individual seeking employment.

7. Examples of the advertisements referred to in Finding of Fact No. 6 are:

A. College grad—Born again Christian with Bachelor's Degree and seven yrs. sales and marketing management experience seeking work with Christian business or organization. (Stipulated Exhibit "A-1").

b. White woman, desires day work, office cleaning. (A-1)

c. Parolee—White needs employment to be released. Licensed steam boiler and engineer. (A-1)

d. Salesman—Age 30, looking for career in Pittsburgh, start immediately, 15 years sales experience. (A-1)

e. What can I do for you? Recent college grad, good looking, twenty-five years old, B.S. in Business Administration, seeks entry level management position . . . (A-8).

f. Man, mature, accounting, bookkeeping, office management, desires position in these or related fields. (A-23).

8. The Respondent engages in a pattern and practice of publishing "situation-wanted" advertisements from individuals seeking employment which specify or in some manner express the race, color, religious creed, ancestry, age, sex or national origin of the individual placing the advertisement.

9. This pattern and practice engaged in by the Respondent aids and abets the doing of the act declared to be an unlawful discriminatory practice by Section 5 (g) of the Act.

10. This pattern and practice engaged in by the Respondent also aids and abets discrimination in hiring declared to be an unlawful discriminatory practice by Section 5 (a) of the Act.

11. The Commission has not alleged that advertisements placed by candidates for political office violate any provisions of the Act.

CONCLUSIONS OF LAW

1. At all times herein mentioned the Commission had and still has jurisdiction over the Respondent and

the subject matter of the complaint herein pursuant to the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended.

2. Subject to limitations described generally in Conclusions of Law No. 6, situation-wanted advertisements which specify or in any manner express the race, color, religious creed, ancestry, age, sex or national origin of the individual seeking employment are in violation of Section 5 (g) of the Act.

3. Such advertisements are not protected by the First Amendment to the Constitution of the United States.

4. The conduct of the Respondent in engaging in a pattern and practice of publishing such situation-wanted ads is not protected by the First Amendment to the Constitution of the United States.

5. The Respondent's conduct in publishing situation-wanted advertisements the contents of which are in violation of Section 5 (g) of the Act is in violation of Section 5 (e) of the Act.

6. Not all situation-wanted advertisements which specify or express in some manner the race, color, religious creed, ancestry, age, sex or national origin of an individual seeking employment are in violation of Section 5 (g). Those advertisements clearly directed at or seeking employment from prospective employers who are not within the jurisdiction of the Act are not unlawful.

For example, an employer to be within the jurisdiction of the Act must employ four or more persons within the Commonwealth. An individual employed in agriculture or domestic service or

who resides in the personal residence of the employer is not covered.

On the other hand, an advertisement which specifies or otherwise expresses any of the prohibited information and which is written in such general language that it is not clearly limited to employers or positions not within jurisdiction of the Act, or is directed at employers covered by the Act as well as employers not covered, is unlawful.

7. Advertisements placed by candidates for political offices are not affected by these Conclusions of Law.

RECOMMENDATION OF HEARING COMMISSIONERS

AND NOW, this day of , 1976, upon consideration of the record of the public hearing and the arguments of Counsel and briefs submitted by the parties and the proposed History of the Case, Findings of Fact and Conclusions of Law, the Hearing Commissioners recommend to the Commission that an order be entered against the Pittsburgh Press Company finding that it has violated Section 5 (e) of the Act and providing for appropriate relief.

(s) Elizabeth M. Scott
Elizabeth M. Scott
Chairperson

(s) Robert Johnson Smith
Robert Johnson Smith

(s) John P. Wisniewski
John P. Wisniewski

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS
COMMISSION

Docket No. E-8528

PENNSYLVANIA HUMAN RELATIONS
COMMISSION,

Complainant

vs.

PITTSBURGH PRESS COMPANY,
A CORPORATION,

Respondent

COMMISSION'S DECISION

AND NOW, this day of , 1976, upon consideration of the record of the case, the briefs submitted by the parties, the History of the Case, Findings of Fact and Conclusions of Law and the Recommendation of Hearing Commissioners, the Pennsylvania Human Relations Commission finds and determines that the Respondent, Pittsburgh Press Company, has violated Section 5 (e) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, in that it engages in a pattern and practice of accepting and publishing "situation-wanted" advertisements from individuals seeking employment which

specify or in some manner express the race, color, religious creed, ancestry, age, sex or national origin of such individuals, thus aiding and abetting these individuals to violate Section 5 (g) of the Act.

PENNSYLVANIA HUMAN
RELATIONS COMMISSION
By: (s) Joseph X. Yaffe
Joseph X. Yaffe
Chairperson

Attest:
(s) Elizabeth M. Scott
Elizabeth M. Scott
Secretary

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS
COMMISSION

Docket No. E-8528

PENNSYLVANIA HUMAN RELATIONS
COMMISSION,

Complainant

vs.

PITTSBURGH PRESS COMPANY,
A CORPORATION,

Respondent

FINAL ORDER

AND NOW, this day of , 1976, upon consideration of the foregoing History of the Case, Findings of Fact, Conclusions of Law and Recommendation of the Hearing Commissioners and pursuant to Section 9 of the Pennsylvania Human Relations Act, the Pennsylvania Human Relations Commission hereby

ORDERS:

1. The Respondent shall cease and desist from publishing "situation-wanted" advertisements the contents of which are prohibited by Section 5(g) of the Act.

2. The provisions of this order shall be effective immediately.

PENNSYLVANIA HUMAN
RELATIONS COMMISSION
By: Joseph X. Yaffe
Chairperson

Attest:
Elizabeth M. Scott
Secretary

APPENDIX B

OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA

Opinion by Judge Kramer, Filed: July 21, 1977:

This is an appeal by the Pittsburgh Press Company (the Press) from an order of the Pennsylvania Human Relations Commission (the Commission) ordering the Press to cease and desist the publication of "Situation-Wanted" advertisements the contents of which are prohibited by Section 5(g) of the Pennsylvania Human Relations Act (Act),[1] in that those contents specify or in some manner express the race, color, religious creed, ancestry, age, sex or national origin of the person placing the advertisement.

The facts in this case are quite simple. The Press prints a "Situations Wanted" classification in its classified advertisement pages as a service to its readers. Advertising space is, of course, paid for by the advertisers. Situation-wanted advertisements provide a means by which persons seeking employment may communicate their qualifications and job aspirations to the employing public at large. Usually, such an advertisement consists of a brief description of the jobseeker and the type of job he or she desires. The Press publishes these advertisements exactly as they are sub-

[1] Act of October 27, 1955, P.L. 744, *as amended*, 43 P.S. §955(g).

mitted. Beyond listing the ads alphabetically, the Press in no way alters any ad nor attempts to classify them further than by the simple "Situations Wanted" classification.

Section 5 of the Act provides *inter alia*:

> "It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such association or corporation, or except where based upon applicable security regulations established by the United States or the Commonwealth of Pennsylvania:
>
> "(a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or to other discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required.
>
> . . . .
>
> "(e) For any person, whether or not an employer, employment agency, labor organization or employe, to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, or to obstruct or prevent any person from complying with the provisions of this act or any order issued thereunder, or to attempt, directly or indirectly, to commit any act declared by this section to be unlawful discriminatory practice.
>
> . . . .
>
> "(g) For any individual seeking employment to publish or cause to be published any advertisement which specifies or in any manner expresses his race, color, religious creed, ancestry, age, sex or national origin, or in any manner expresses a limitation or preference as to the race, color, religious creed, ancestry, age, sex or national origin of any prospective employer."

On March 11, 1975, the Commission initiated a complaint charging the Press with violating Section 5 (e)[2] of the Act by having aided and abetted the doing of an unlawful discriminatory act prohibited by Section 5 (g).

After attempts at conciliation failed, a public hearing was held by the Commission on August 6, 1975, which resulted in a unanimous recommendation by the Hearing Panel that the full Commission find in favor of the complainant. The cease and desist order was subsequently issued by the Commission.

An indication of the type of advertisement found by the Commission to violate Section 5 (g) can be ascertained from the specific examples set forth in the Hearing Panel's findings of fact. These examples were drawn from stipulated exhibits which included the Press' "Situation Wanted" columns from Sunday, June 1, 1975 to Thursday, June 26, 1975:

> "COLLEGE GRAD—Born again Christian with Bachelor's Degree and seven yrs. sales and

[2] 43 P.S. §955(e).

marketing mgmt. experience seeking work with Christian business or organization. . . ."[3]

"White woman—desires day work, office cleaning."[4]

"Parolee—White needs employment to be released. Licensed steam boiler and engineer. . . ."[5]

"Salesman—Age 30, looking for career in Pittsburgh, start immediately, 15 years sales experience. . . ."[6]

"What can I do for you? Recent college grad, good looking, twenty-five years old, B.S. in Business Administration, seeks entry level management position."[7]

"Man—mature, accounting bookkeeping, office management, desires position in these or related fields."[8]

It is obvious at a glance that the contents of these advertisements are in contravention of the letter of Sec-

[3] Exhibit A-1 (Rec. 27a).

[4] Exhibit A-1 (Rec. 27a).

[5] Exhibit A-1 (Rec. 27a).

[6] Exhibit A-1 (Rec. 27a).

[7] Exhibit A-8 (Rec. 34a).

[8] Exhibit A-23 (Rec. 48a). Due to the misplacement of an exhibit in original stipulation of facts which was corrected in the appellant's printed record, the designation of the exhibits from A-15 to the end of the "A" exhibits, does not coincide in the two records. For example, "A-23" in the original record will appear as "A-22" on page 48a of the printed record. The exhibit references herein are from the original record, but the page in the printed record is also included.

tion 5 (g).[9] The Press does not contend otherwise. It does, however, challenge the constitutional validity of Section 5 (g) on the basis of the First and Fourteenth Amendments to the United States Constitution.[10]

Initially, the Commission raises the question of the Press' standing to challenge Section 5 (g). We are certain that the Press does have standing to challenge that Section of the Act. The order entered against the Press was the result of the Commission's determination that the Press had aided and abetted the violation of Section 5 (g). In the words of the Court in *Griswold v. Connecticut,* 381 U.S. 479, 481 (1965), "Certainly

[9] The Court has analyzed the contents of the Press' situation-wanted ads for June 1, 1975 to June 26, 1975 in terms of the prohibitions in Section 5(g). The figures arrived at are less than exact, because many references, especially as to age, are quite subtle, if they are intentional at all.

Of a total of 845 ads, 307 indicated in some manner the sex of the advertiser. Approximately 55.7 percent of these were males, while 44.3 percent were females. There were 82 ads which gave some indication of age. Some of these were explicit. Many were in terms of "young" or "elderly", while a large number of ads conveyed the advertisers "maturity" in terms of a high figure for years of experience in their fields. Using the figure of 40 years as approximately halfway between entry into the job market and the normal retirement age, we find that 47 of the ads conveyed the impression of "youth" while 35 of the ads expressed the "maturity" of the advertiser. This is approximately a 57.3 percent to 42.7 percent breakdown. There were only four references to race; all to the "white" race. There was one ad which referred to religion, and there were no references to national origin or ancestry.

[10] The First Amendment is applicable to the States via the Fourteenth Amendment. *Schneider v. State,* 308 U.S. 147, 160 (1939).

the accessory should have the standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be, a crime." The same logic is applicable here to confer standing on the Press to challenge Section 5 (g).[11]

The Press asserts that its advertisers have the right to submit for publication, and the Press has the right to publish, situations-wanted advertisements the contents of which are offensive to Section 5 (g), and that the proscription of Section 5 (g) unconstitutionally infringes on those rights in derogation of the First Amendment. The Commission answers first with the contention that these ads propose "purely commercial transactions" and thus do not come within the protection of the First Amendment.

The doctrine that speech is unprotected per se if it is purely commercial in nature was first propounded in *Valentine v. Chrestensen,* 316 U.S. 52 (1942). Any

[11] This particularly true in this case, where the Commission chose not to press its complaint against any of the advertisers, but only against the Press. To accept the Commission's standing argument would be to allow the Commission to forever avoid review of Section 5(g) by simply never commencing proceedings against anyone directly pursuant to Section 5(g).

Moreover, we note that the Press is not merely raising the rights of third persons in its attack on 5(g). From past litigation, the Press has learned that a First Amendment attack on a citation for aiding and abetting may not prevail if the provision creating the underlying substantive offense is left unchallenged. *See Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U.S. 376 (1973). While the aiding and abetting violated may not be so, in which case the Press must challenge the latter provision in order to vindicate its own constiutional rights.

vitality remaining in that doctrine after the decision in *Bigelow v. Virginia* (hereinafter *Bigelow*), 421 U.S. 809 (1975), was completely extinguished in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 96 S.Ct. 1817 (1976) (hereinafter *Virginia Pharmacy*). In *Virginia Pharmacy* the Court stated:

> "Our question is whether speech which does 'no more than propose a commercial transaction' . . . is so removed from any 'exposition of ideas' . . . and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government' . . . that it lacks all protection. Our answer is that it is not." 425 U.S. at 762, 96 S.Ct. at 1826.

The Court recognized that the basic need for the free flow of commercial information for the proper functioning of a free market economy "suggests that no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn." 425 U.S. at 765, 96 S.Ct. at 1827.[12] The conclusion that purely commercial speech is not unprotected per se has been emphatically reaffirmed by the Court in *Linmark Associates, Inc. v. Township of Willingsboro* (hereinafter *Linmark*), U.S. ,

[12] *Bigelow v. Virginia, supra,* which involved advertising of the availability of abortions, did contain indications that an advertisement must have some special societal or political importance in order to be protected speech. The statement quoted in the text makes it clear that the Court now eschews such a limitation. Advertising per se is now recognized to be of sufficient importance to our society to merit some First Amendment protection.

45 U.S.L.W. 4441 (May 2, 1977), where an ordinance banning "For Sale" and "Sold" signs for the purpose of stemming "panic selling" and "white flight" from the community was held unconstitutional under *Virginia Pharmacy*.

Although it is thus clear that situation-wanted advertisements are not *unprotected per se*, it remains to be decided whether the contents of such an ad which run afoul of Section 5 (g) may be constitutionally suppressed. The Court in *Virginia Pharmacy* recognized that commercial speech is not immune from regulation, 425 U.S. at 770, 96 S.Ct. at 1830, and may require less protection than other varieties of speech in order to insure an unimpaired "flow of truthful and legitimate commercial information." 425 U.S. at 771-72 n. 24, 96 S.Ct. at 1830 n. 24.

In attempting to show that the cease and desist order in this case is pursuant to such a valid regulation of commercial speech, the Commission relies upon the decision in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations* (hereinafter *Press I*), 413 U.S. 376 (1973). In *Press I*, the Court upheld an order directing the Press to cease and desist the publication of *help-wanted* advertisements under sex-based classification headings. In particular the Commission relies on the Court's statement that—

> "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Press I* at 389.

Later cases have also alluded to the validity of advertising restrictions related to the illegality of the transaction proposed by the advertisement. *Virginia Pharmacy* at 771, 96 S.Ct. 1825; *Bigelow* at 821. However, not since *Press I* has the Court actually dealt with a case involving a ban on commercial speech "incidental" to an underlying valid limitation on economic activity or the prevention of an illegal transaction.[13]

There is no doubt that the underlying commercial activity sought to be banned by Section 5 (a) is illegal. The Press in no way challenges the Section 5 (a) prohibition of discrimination in employment on the basis of race, color, religious creed, ancestry, age, sex or national origin. The quote from *Press I* would indicate that we then need only to determine whether the advertising restrictions of Section 5 (g) are "incidental" to that prohibition. If it is, then 5 (g) would be valid and any need for balancing obviated. The posture of *Press I* and the decisions in later cases convince

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[13] In *Linmark* and *Virginia Pharmacy* the advertising restrictions were related to the States' general interest in integrated housing and professional standards of pharmacists, respectively, but they were not incidental to any specific regulation in those areas. The restrictions were enacted to further the States' interests *in and of themselves*, and not as *ancillary* to a specific underlying regulation. In *Bigelow*, although abortion was illegal in Virginia, it was not illegal in New York at the time. Naturally, Virginia was without power to regulate abortions in another state, so a ban on the advertising of abortion availability in New York could not be characterized as *incidental* to a *valid* limitation on, or regulation of, abortions.

us, however, that this is no longer the appropriate "test."

Press I must be read in light of the fact that the Press did not there challenge the section of the Pittsburgh Ordinance which prohibited the indicating of sex discrimination in advertising by employers, employment agencies, and labor unions. The Press challenged only that section of the ordinance which made it unlawful for any person to aid in the doing of any act declared to be an unlawful employment practice by the ordinance. Because the Press conceded the illegality of not only sex discrimination in employment but also the advertising of same, and because the facts in *Press I* revealed that the Press was clearly aiding in the propogation of such advertising, the Court was not compelled to formulate any refined "test" for the validity of speech restrictions related to activities which the government may legitimately regulate or prohibit. The word "incidental" was a sufficient description of the relationship under the circumstances of *Press I*.

Two years after *Press I*, the Court decided the *Bigelow* case. Although it was eventually determined that the prohibition of advertising the availability of abortions did not relate in any way to a *valid* underlying regulation of conduct under the particular facts of that case,[14] the *Bigelow* case did prompt the Court to reformulate its "test" or standard of review for this type of commercial speech case. The Court stated:

> "To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged." *Bigelow* at 826.

[14] *See* note 13, *supra*.

We believe that a balancing analysis is the appropriate standard of review for the present case. The factors to be weighed are the opposing First Amendment and governmental interests, the effectiveness of the speech restriction in promoting the underlying valid regulation, and the extent of any incidental restrictions on legitimate forms of commercial speech.[15]

[15] As indicated by note 13, *supra*, there appear to be two basic types of commercial speech content regulation. The first type is intended to further the government's interest in an area in and of itself, such as the price advertising ban in *Virginia Pharmacy* or the ban on "Sold" and "For Sale" signs in *Linmark*. The second type is intended to be *ancillary* to, or serve as the natural adjunct of, a specific and direct regulation of some activity, as in *Press I* and the present case. We perceive somewhat different standards of review for each type of regulation.

A reading of *Bigelow* reveals that the Court's approach, at that time, was to determine by balancing whether any individual advertisement was protected by the First Amendment. Advertising was not unprotected per se, but there was a "rebuttable presumption" of no protection. *Virginia Pharmacy* reversed this "presumption" by concluding that commercial speech *in general* was protected. The Court did, however, also conduct a balancing of the factors in the specific case before it, indicating that balancing survived as a means of determining exceptions to the new blanket protection for commercial speech. Finally, in *Linmark* the Court paraphrased a line from *Virginia Pharmacy* and simply held the ordinance involved to be unconstitutional because it "impaired 'the flow of truthful and legitimate commercial information.'" 45 USLW at 4445. This "test" was easy to apply in *Linmark* because truthful information will be legitimate if the activity

The Commonwealth's asserted interest in the prevention of employment discrimination based on race, color, religious creed, ancestry, age, sex or national origin is certainly a substantial one. Pitted against it is the jobseeker's interest in being able to fully, yet truthfully,[16] utilize the press to "advertise" himself or herself in that manner and by such terms as he or she believes will be most efficacious in producing the desired result. That this interest must not be minimized can be seen by looking at its component parts. As a pure matter of expression, there is the basic interest of the individual in being able to tell anyone who will listen just who and what that individual is: to be able to say "I am black" as well as "I am a college graduate" or "I am male" as well as "I am ambitious". The purpose for such expression provides, in the present case, an additional element of import. The Supreme Court long ago recognized the great magnitude of the individual's interest in obtaining employment

or transaction which is the subject of the commercial speech is not prohibited or limited by valid regulation. However, where a speech restriction is ancillary to a specific prohibition or restriction of an activity, that underlying regulation may, in effect, deprive certain speech of its "legitimacy". A ban on the advertising of prostitution, where prostitution itself is illegal, is a clear example. Other cases, like the present one, are not so clear. There is no obvious and direct relationship between situation-wanted ads and discrimination by employers. It is in cases such as this that we believe a proper resolution requires a balancing analysis of the opposing interests, the effectiveness of the ban as ancillary to the underlying valid regulation, and the extent of incidental restrictions on legitimate commercial speech.

[16] The Commission has not alleged that any of the ads are false or misleading.

and earning a living. *Truax v. Raich,* 239 U.S. 33 (1915).[17] Here we are not dealing with the ordinary transaction between a "seller hawking his wares and a buyer seeking to strike a bargain". *Virginia Pharmacy* at 425 U.S. 781, 96 S.Ct. 1835 (Rehnquist, J., dissenting). We are dealing with the efforts of individuals to sell the only thing that they have to offer: their labor. For the users of the situation wanted column, often the least skilled and most desperate jobseekers, the quest for employment may cause the liveliest political or social controversy of the day to shrink to insignificance by comparison.[18]

We now come to the question of the relationship of the speech involved here to the commercial activity subject to regulation. *Bigelow* at 826. The Act does not prohibit individuals from accepting or rejecting jobs on the basis of one of the "forbidden criteria". Thus, the relationship which we must focus upon is the relationship of the speech involved here to illegal discrimination by *employers.* Stated another way, we

[17] "[T]he right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." 239 U.S. at 41.

[18] The recognized qualitative and quantitative difference in the interest of the job-seeker as opposed to the interest of an employer involved in the hiring of employees serves as one way to distinguish this case from one involving a challenge to a ban on the advertising of discriminatory hiring by an employer. The filling of job vacancies in the usual course of business surely must be accorded a lesser weight in a balancing analysis than an individual's interest in obtaining a job. The former is a routine matter of business practice, while the latter is usually one of economic survival.

must assess the extent to which Section 5 (g) promotes the fulfillment of the purpose of Section 5 (a).

The Commission asserts that permitting job-seekers to specify their race or sex, for example, will provide the prejudiced employer with an easy means to perpetrate discriminatory hiring. We do not believe that such an advertisement provides an employer so disposed with an easier or better tool for discrimination than does a resume or job interview.[19] Here, we must distinguish *Press I*. In *Press I*, the advertisers and the Press were classifying *jobs* on the basis of sex. Discriminatory hiring was faciliated because persons of one gender were *discouraged* from even *applying* for a job that was advertised as being of "interest" only to persons of the opposite gender. As the Court stated in *Press I* at 387, "By implication, at least, an advertiser whose want ad appears in the 'Jobs—Male Interest' column is likely to discriminate against women in his hiring decisions." Moreover, the positive relationship between the advertisements in *Press I* and sex discrimination in employment was reflected in the record.

[19] We note that the Commission's argument is unsupported by the record itself in the sense that one would expect a much higher number and proportion of references to characteristics preferred by the prejudiced employer if the situation-wanted column had become an avenue for "easy" discrimination. Yet, no particular group characterized by any of these traits dominates the column. The numerically frequent references to age and sex are fairly evenly divided between age groups and genders. References to race, religion, and national origin rarely appeared, if at all. *See* note 9, *supra*. While these figures cannot prove that discrimination does not occur as a result of the ads, it is likewise true that they do not support a conclusion that it does occur.

Press I at 381 n. 7. In the present case, we are dealing with *individuals who choose to classify themselves* according to race, sex, or one of the other traits. There is no evidence in the record that ads of the type found objectionable by the Commission result in employment discrimination, nor do such ads imply, as did those in *Press I*, that any employer is likely to discriminate in hiring. Section 5 (g) does not directly affect hiring practices one way or another. It affects them only through the reactions it is assumed employers will have to the free flow of information. *See Virginia Pharmacy* at 425 U.S. 755, 96 S.Ct. 1820. And we believe, moreover, that the Commission's assumptions as to employer reactions are narrowly one-sided and thereby fail to draw attention to the impact of Section 5 (g) on other, legitimate, aspects or uses of the commercial speech involved here.

The Commission apparently assumes that only the prejudiced employer will react to or affirmatively utilize the "objectionable" characteristic information in these ads. This overlooks the possibility that a fair-minded employer may react in the negative to any ad that specifies any race, sex, religion, age or national origin. Such an employer may seek to avoid hiring individuals who are themselves prejudiced. More importantly, the Commission overlooks a quite legitimate use of this type of characteristic information. "Equal Opportunity" and "Affirmative Action" employers may use the information in such ads to find more minority applicants to interview for a position.[20] Even

[20] We specifically confine this statement to recruiting minorities for interviews or consideration for a job, and thus need not discuss the issue of the validity of "reverse discrim-

an ad which boldly "specifies" such information has this legitimate use.

Moreover, Section 5 (g) impedes the flow of greater amounts of legitimate commercial information by banning ads which "in any manner" express any of the "forbidden" characteristics. A job-seeker's name is, beyond doubt, a completely legitimate item of information in a situation-wanted ad. Yet Section 5 (g) is obviously offended in one or more respects by, just as examples: Svenson, Weinstein, Tanaka, Kowalski, Garcia, O'Brien, or Schmidt. Most given names, such as Dennis[21] and Joyce,[22] leave little more doubt as to gender than do the titles "Mr.", "Mrs.",[23] and even "Ms."

Section 5 (g) would also suppress vital information relating to job qualifications. A person's alma mater, be it high school or college level, can inform an employer of the quality of education a job-seeker has had. Yet 5 (g) would prohibit the inclusion in an ad of "North Catholic High School" or "Oral Roberts University". For indicating race, "Morgan State" or "Grambling" would offend 5 (g). The graduate of the all-female Carlow College would likewise transgress 5 (g) by advertising that fact. Another important job qualification is experience. However, one with as very much experience as 30[24] or 55[25] years may find that

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ination". As to that issue, *see Chmill v. City of Pittsburgh*, , Pa. Commonwealth Ct. , A.2d (No. 1047 1976, filed July 18, 1977).

[21] Exhibit A-13 (Rec. 39a).

[22] Exhibit A-20 (Rec. 45a).

[23] Exhibit A-17 (Rec. 42a).

[24] Exhibit A-14 (Rec. 40a).

[25] Exhibit A-14 (Rec. 40a).

this excellent qualification cannot be advertised because it also expresses a good indication of relative age. The baby-sitter who describes herself as an "experienced mother",[26] perhaps a very persuasive qualification to many with young children, clearly violates 5 (g). Finally, 5 (g) would require the "Salesman",[27] "Body man",[28] "Handyman",[29] and "Cleaning Lady"[30] to find some other way to denote their chosen occupation without connoting gender. While it may very well be completely valid to require an employer-advertiser to substitute "-person" as the suffix of these words when used to describe a job, to compel an individual to describe himself or herself in such stilted and sterile language, or forgo speaking at all, smacks of the imposed linguistic conformity of an Orwellian nightmare.

The result of our balancing analysis should, at this point, be clear. We conclude that the Commission has failed to show that Section 5 (g) in any way significantly furthers the Commonwealth's concededly substantial interest in eradicating employment discrimination. We also conclude, on the other hand, that application of Section 5 (g) would have the effect of significantly impairing the flow of legitimate and truthful commercial information. In view of these conclusions, it is clear that the balance in this case must be tipped in the favor of the First Amendment interest of the advertisers and against the constitu-

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[26] Exhibit A-9 (Rec. 35a).

[27] Exhibit A-9 (Rec. 35a).

[28] Exhibit A-10 (Rec. 36a).

[29] Exhibit A-1 (Rec. 27a).

[30] Exhibit A-18 (Rec. 43a).

tional validity of the challenged portion of Section 5 (g).[31] We hold, therefore, that the Commission is without power to prohibit the inclusion in any situation-wanted advertisement of any specification or expression of the advertiser's race, color, religious creed, ancestry, age, sex or national origin. As a natural consequence, we further hold that the cease and desist order entered against the Press for aiding and abetting the publication of such situation-wanted advertisements is constitutionally invalid. We therefore reverse.

Harry A. Kramer,
Judge

[31] The Commission charged the Press only with aiding the publication of advertisements which specify or express the "prohibited" characteristics of the *job-seeker*. That portion of 5(g) which prohibits the job-seeker from expressing in the ad any limitation or preference as to the race, color, religious creed, ancestry, age, sex, or national origin of the prospective *employer* is not presently before us, and, therefore, is not invalidated or directly affected by today's decision.

APPENDIX C

THE SUPREME COURT OF PENNSYLVANIA
Western District

801 City-County Building
Pittsburgh, Pa. 15219
January 24, 1979

Robert S. Mirin, Esquire
Pa. Human Relations Commission
100 N. Cameron Street
Harrisburg, Pa. 17101

John E. Benjes, Esquire
301 Muench Street
Harrisburg, Pa. 17102

In Re: Pa. Human Relations Commission v. Pgh. Press Co., No. 42 March Term, 1978

Dear Messrs. Mirin and Benjes:

Enclosed is a copy of the opinion filed today, together with the judgment order which was entered today.

Very truly yours,
(s) Irma T. Gardner
Deputy Prothonotary

Enclosures
cc: Robert H. Shoop, Jr., Esquire
Thorp, Reed and Armstrong
2900 Grant Building
Pittsburgh, Pa. 15219

Honorable James S. Bowman
for Hon. Harry A. Kramer
President Judge, Commonwealth Court
622 South Office Building
Harrisburg, Pa. 17120

SUPREME COURT OF PENNSYLVANIA
Western District

No. 42 March Term, 1978

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA HUMAN RELATIONS COMMISSION,
Appellant

v.

PITTSBURGH PRESS COMPANY

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the COMMONWEALTH COURT OF PENNSYLVANIA, be, and the same is hereby affirmed.

By the Court:
(s) Sally Mrvos
Sally Mrvos, Esquire
Prothonotary

Dated: January 24, 1979

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

No. 42 March Term, 1978

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA HUMAN RELATIONS COMMISSION,
Appellant

v.

PITTSBURGH PRESS COMPANY,
Appellee

Appeal from the Order of the Commonwealth Court of Pennsylvania at No. 1275 C.D. 1976 reversing the Order of the Pennsylvania Human Relations Commission at Commission Docket No. E-8525.

OPINION

JUSTICE MANDERINO, Filed Jan 24 1979:

This appeal is from the order of the Commonwealth Court reversing the order of the Pennsylvania Human Relations Commission (Commission), and declaring unconstitutional that portion of Section 5(g) of The Pennsylvania Human Relations Act, 43 P.S. §955(g). Section 5(g) prohibits the publication of advertisements for employment expressing the race, color, religious creed, ancestry, age, sex, or national origin of

the advertiser. *Pittsburgh Press Co. v. Comm., Human Relations Commission,* 31 Pa. Commonwealth Ct. 218, 376 A.2d 263 (1977).

The circumstances surrounding this appeal are as follows. On March 15, 1975, the Commission charged the Pittsburgh Press Company (Press) with "maintain[ing] a pattern and practice of aiding and abetting the doing of an unlawful discriminatory act" in violation of Section 5(e) of The Pennsylvania Human Relations Act. According to the Commission, the Press violated Section 5(e) of the Act by publishing "situation wanted" advertisements alleged to be unlawful under Section 5(g) because the ads identified the advertiser's sex, race, religion, or age.

The Pittsburgh Press is a newspaper of general circulation throughout the greater Pittsburgh metropolitan area. The "situation wanted" section of the Press' classified advertisements provides a vehicle for persons seeking employment to describe themselves, their job qualifications, and the kind of employment they are seeking. The Press accepts and publishes these ads exactly as submitted by the advertisers.

On June 27, 1975, following an investigation from which the Commission determined that there was probable cause to credit the allegations contained in the complaint referred to above, the Commission issued a final order requiring the Press to cease and desist from publishing "situation wanted" advertisements, the contents of which are prohibited by Section 5(g).

On appeal, the Commonwealth Court reversed the Commission's final order, and ruled that Sub-section 5(g) was unconstitutional. We granted the Commission's petition for allowance of appeal, and this appeal followed.

The Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, §1, as amended 43 P.S. §§951, et seq., establishes it as

> ". . . the public policy of this Commonwealth to foster the employment of all individuals in accordance with their fullest capacities regardless of their race, color, religious creed, ancestry, handicap or disability, use of guide dogs because of blindness of the user, age, sex, or national origin, and to safeguard their right to obtain and hold employment without such discrimination, to assure equal opportunities to all individuals and to safeguard their rights at places of public accommodation and to secure commercial housing regardless of race, color, religious creed, ancestry, sex, handicap or disability, use of guide dogs because of blindness of the user or national origin."

To further this public policy, Section 5 of the Act makes certain discriminatory employment practices unlawful. 43 P.S. §955(a) through (j). Among other things, in 5(g), the Act makes it unlawful employment discrimination

> "[f]or any individual seeking employment to publish or cause to be published any advertisement which specifies or in any manner expresses his race, color, religious creed, ancestry, age, sex or national origin, or in any manner expresses a limitation or preference as to the race, color, religious creed, ancestry, age, sex or national origin of any prospective employer."
>
> 43 P.S. §955(g).

Section 5 (e) also makes it unlawful

> "[f]or any person, whether or not an employer, employment agency, labor organization or employe, to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, . . ."

The Commission found that by accepting and presenting "situation wanted" advertisements which included references to the criteria declared unlawful by Section 5 (g), the Press had "aided and abetted" the unlawful employment practice proscribed by that section, the Press was therefore found to be in violation of Section 5 (e).

The Commonwealth Court recognized that the advertisements which formed the basis of the Commission's complaint clearly violated Section 5 (g):

> "An indication of the type of advertisement found by the Commission to violate Section 5 (g) can be ascertained from the specific examples set forth in the Hearing Panel's findings of fact. These examples were drawn from stipulated exhibits which included the Press' 'Situation Wanted' columns from Sunday, June 1, 1975 to Thursday, June 26, 1975:
>
> 'COLLEGE GRAD—Born again Christian with Bachelor's Degree and seven yrs. sales and marketing mgmt. experience seeking work with Christian business or organization. . . .'
>
> 'White woman—desires day work, office cleaning.'
>
> 'Parolee—White needs employment to be released. Licensed steam boiler and engineer. . . .'

> 'Salesman—Age 30, looking for career in Pittsburgh, start immediately, 15 years sales experience. . . .'
>
> 'What can I do for you? Recent college grad, good looking, twenty-five years old, B.S. in Business Administration, seeks entry level management position.'
>
> 'Man—mature, accounting, bookkeeping, office management, desires position in these or related fields.'
>
> It is obvious at a glance that the contents of these advertisements are in contravention of the letter of Section 5 (g)."
>
> (Footnotes omitted.)
>
> 31 Pa. Commonwealth Ct. at 223, 376 A.2d at 265.

The Press did not contend otherwise before the Commonwealth Court, nor does it so contend here. The Press argues, however, that Section 5 (g) unlawfully infringes on First Amendment rights. We agree with the Commonwealth Court that the advertiser's rights, as guaranteed by the First Amendment to the United States Constitution, are improperly restricted by the prohibition of Section 5 (g). We therefore affirm the order of the Commonwealth Court.

The Press did not contend before the Commonwealth Court that the state may not prohibit discriminatory employment practices. It argued, however, that the restriction on freedom of expression contained in Section 5 (g) is not necessary to promote that legitimate state objective. We agree with the Press that the Commission has not shown that the prior restraint of

Section 5(g) is necessary to promote this legitimate state interest. The Commission argued that this case is controlled by *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U.S. 376, 37 L.Ed. 2d 669, 93 S.Ct. 2553 (1973) (Press I). The Press argues that in light of more recent pronouncements of the United States Supreme Court, *Press I* is no longer viable law. We need not decide this point, however, because unlike the situation in *Press I,* what the Commission seeks to do in this case is to restrict the expression of the advertiser itself, rather than to restrict the unlawful activity of employment discrimination. While it held that legitimate regulation of an unlawful activity may incidentally effect an advertiser's right to freedom of expression, *Press I* does not stand for the proposition that prior restraint may be imposed on commercial speech even though that speech does not propose an illegal transaction.

The United States Supreme Court has, of course, said that it is permissible to regulate commercial advertising in some ways: "[a]dvertising that is false, deceptive, or misleading . . . is subject to restraint" *Bates v. State Bar of Arizona,* 433 U.S. 350, 383, 53 L.Ed. 2d 810, 835, 97 S.Ct. 2691, (1977); *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748, 48 L.Ed. 2d 346, 96 S.Ct. 1817 (1976); as is purely commercial advertising concerning transactions that are themselves illegal, *Bates v. State Bar of Arizona, supra; Press I, supra.* Similarly, reasonable restrictions may be placed upon the time, place, and manner of advertising *Virginia Pharmacy Board, supra;* and special restrictions may be allowable with regard to advertising on the electronic broadcast media, *cf. Capital Broadcasting Co. v. Mitchell,* 333 F. Supp. 882 (D.C. 1971), *aff'd sub nom Capital Broadcasting Co. v. Acting Attorney General,* 405 U.S. 1000, 31 L.Ed. 2d 472, 92 S.Ct. 1289 (1972).

The restriction imposed by Section 5(g), however, goes directly to the advertiser's right to freely express his or her job qualifications, abilities, personal experience, or educational history. In *Press I,* the employer's placement of "Help-wanted" containing sex preference designations constituted an act of illegal sex discrimination in the hiring of personnel. As a result, the Supreme Court said in *Press I,* that

> "[a]ny First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity."
>
> 413 U.S. at 389, 37 L.Ed. 2d at 679, 93 S.Ct. at .

In contrast to the advertising employer's illegal, sex-based, employment discrimination in *Press I,* in the instant case the advertisers are prospective employees proposing commercial transactions—their own employment—which are not illegal. By its terms, the Act applies to employers, and those who aid and abet employers to practice employment discrimination. In *Press I* the Act clearly proscribed the underlying activity—sex based discrimination by the employer—and by providing sex-designated Help-wanted columns in its classified advertising section, the Press directly

aided and abetted such employers' practice of sex based employment discrimination. Indeed, the Press did not challenge the illegality of the underlying acts in *Press I*. In the present case, the "situation wanted" ads propose no illegal transactions, they simply ask that prospective employers hire the respective individual advertisers. The prospective *employees'* use of prohibited employment criteria in an advertisement cannot reasonably be said to aid an employer who might be predisposed to utilize such forbidden criteria. Knowledge of such forbidden criteria—age, sex, race, color, etc.,—is readily obtainable by the employer simply by scheduling a pre-employment interview, or by requesting submission of an employment resume. Any effect that enforcement of Section 5 (g) might have on reducing employment discrimination made illegal by Section 5 (e) is thus too speculative to justify Section 5 (g) 's direct restriction on the advertiser's freedom of expression.

As was stated by the United States Supreme Court in *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 92 ft. n. 6, 52 L.Ed. 2d 155, 161 ft. n. 6, 97 S.Ct. 1614, (1977):

> "After *Virginia Pharmacy Bd.* [*v. Virginia Consumer Council*, 425 U.S. 748, 48 L.Ed. 2d 346, 96 S.Ct. 1817 (1976)] it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is detrimental."

In *Linmark*, the record failed to support the township's assumption that proscribing the placement of "for sale" signs in front of township homes would reduce public awareness of realty sales and thereby decrease public concern over selling. Likewise, in the instant case, the record fails to establish the statutory assumption contained in 5 (g) that because of the revelation of supposed illegal employment criteria contained in the prohibited "situation wanted" ads, employer would be more likely to base their hiring decisions on such illegal criteria.

Order of the Commonwealth Court is affirmed.

Former Justice Pomeroy did not participate in the decision of this case.

Mr. Justice Roberts filed a concurring opinion.

Mr. Justice Nix filed a dissenting opinion.

[Caption Omitted]

CONCURRING OPINION

ROBERTS, J., Filed: Jan 24 1979:

In my view, Section 5 (e) of the Human Relations Act,[1] 43 P.S. §955e (1964),[2] insofar as it authorizes the Pennsylvania Human Relations Commission's order directing the Pittsburgh Press to cease and desist publication of "situation wanted" avertisements, is unconstitutional under article I, section 7 of the Pennsylvania Constitution.[3] As Mr. Justice Stewart observed:

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[1] Act of October 27, 1955, P.L. 744, as amended.

[2] §5(e) makes it unlawful "[f]or any person . . . to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice. . . ."

[3] Pa. Const., Art. I, §7, provides:

> "[T]he printing press shall be free to every person who may undertake to examine the proceedings of the

> "If government can dictate the layout of a newspaper's advertising pages today, what is there to prevent it from dictating the news pages tomorrow? . . .
>
> [T]he constitutional guarantee of a free press is more precatory. . . . [I]t is a clear command that government must never be allowed to lay its heavy editorial hand on any newspaper in this country."

Pittsburgh Press Company v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 403-4, 93 S.Ct. 2553, 2568 (1973) (Stewart, J., dissenting, joined by Douglas, J. and specially joined by Blackmun, J.). See generally, *William Goldman Theatres v. Dana*, 405 Pa. 83, A.2d (1961) (Pa. Const. art. I, §7 bars prior restraints). The Commonwealth Court properly reversed the order of the Pennsylvania Human Relations Commission. I therefore join the Court's affirmance.

[Caption Omitted]

DISSENTING OPINION

NIX, J., Filed Jan 24 1979:

In *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed. 2d 669 (1973) (Press I), the United States Supreme Court held an order prohibiting a newspaper from publish-

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legislature or any branch of government, no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. . . ."

ing sex-designated advertisements by employers offering employment not to be violative of the first amendment of the federal constitution. Today, a majority of this Court has found the prohibition of situations wanted advertisements identifying the race, color, religious creed, age and sex of the applicant under circumstances prohibited by the Human Relations Act, Act of Oct. 27, 1955, 43 P.S. §951, *et seq.* (Supp. 1978-79), P.L. 744, *as amended*, to be impermissible under the first amendment. To reach this startling result, the majority has given *Press I* an unwarrantedly narrow interpretation and has read into the recent decision of the United States Supreme Court in the commercial speech area unjustified implications. The majority in its zeal to extend the protection to be given commercial speech, totally ignores this Commonwealth's strong commitment to an egalitarian society. ***See e.g. Pa. Const.*** Art. I §28. I therefore must express my most vehement disagreement.

In *Press I*, the United States Supreme Court avoided the level of protection commercial speech should be accorded by noting:

> [9] Whatever the merits of this contention may be in other contexts, it is unpersuasive in this case. Discrimination in employment is not only commercial activity, it is *illegal* commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes. Nor would the result be different if the nature of the transaction were indicated by placement under columns captioned 'Narcotics for Sale' and 'Prostitutes

> Wanted' rather than stated within the four corners of the advertisement.
>
> The illegality in this case may be less overt, but we see no difference in principle here. Sex discrimination in nonexempt employment has been declared illegal. . . .
>
> 413 U.S. at 388 (emphasis in original) (citations omitted).

The Pennsylvania Human Relations Act, *supra,* announced unequivocally that the practice or policy of discrimination in employment by reason of race, color, religious creed, ancestry, age, sex or national origin is violative of the public policy of this Commonwealth. Section 5 of the Act specifies those practices which have been declared illegal in an effort to eradicate the evils of discrimination. Section 5 (g) prohibits an individual seeking employment from attempting to influence the employment decision by supplying information relating to those factors or qualities which have been proscribed in making such a judgment. Section 5 (e) prohibits a third party from aiding and abetting the transmittal of the prohibited information for the purpose of influencing the employment decision. It is conceded that the ads which form the basis of this lawsuit were in violation of Sections 5 (g) and (e) and therefore illegal under the law of this Commonwealth. Notwithstanding the fact that it has been conceded that the publishing of these ads *was illegal commercial activity* under the terms of the Act, the majority seeks to support its result by finding that the advertiser's rights, as guaranteed by the freedom of expression amendment of the federal constitution, have been improperly curtailed by the mandate of Section 5 (g).

While recognizing that a state may prohibit discriminatory employment practices, the majority argues that the restriction of freedom of expression accomplished by Section 5 (g) "is not necessary to promote that legitimate state objective." (Slip op. p. 6) This position ignores the holding and supporting rationale of *Press I.* In that case, the United States Supreme Court clearly sanctioned the restriction of the advertiser's right to freedom of expression to effectuate a legitimate regulation of an unlawful activity. Moreover, in its latest decisions the United States Supreme Court has reaffirmed the right to restrain commercial advertising that is inimical to the public welfare. *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed. 2d 810 (1977); *Virginia Pharmacy Bd. v. Virginia Consumer Council,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed. 2d 346 (1976).

> The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely. (citation omitted)
>
> Also, there is no claim that the transactions proposed in the forbidden advertisements are themselves illegal in any way.
>
> *Va. Pharmacy Bd. v. Virginia Consumer Council,* 425 U.S. at 771-72. (citations omitted).

Here the transactions proposed in the forbidden advertisements are in themselves illegal. The ads encourage the employer to make the employment decision based upon the prohibited considerations. The commercial speech being restrained is simply a solicitation for discriminatory hiring. The majority seeks to dis-

guise the illegality by characterizing the content of these ads as a mere expression of the applicants "job qualifications, abilities, personal experience, or educational history." This gloss does not dismiss the controlling fact that the qualifications sought to be communicated are not legitimate concerns in the employment decision and are solely for the purpose of encouraging discriminatory hiring decisions. It is not simply a request to be hired as the majority contends, rather it seeks to pollute the hiring decision by introducing the prohibited considerations.

Commercial speech is only distinguishable by its content and the United States Supreme Court has recognized that the first amendment protections should not be withdrawn from it simply because it proposes a mundane commercial transaction. Here, however, the restraint is not being imposed because of the commercial character of the message, but rather the illegal transaction it proposes.

The majority perceives a distinction in the nature of the transactions here and that encountered in *Press I*. I confess that I am unable to comprehend that distinction. In both instances the illegal activity condemned was discriminatory employment. In *Press I*, the regulation was directed to the conduct of the prospective employer. In this appeal, the conduct of the prospective employe is being regulated. Both regulations were directed to the same end, i.e. discriminatory hiring. Further, both regulations did not impinge upon the free flow of commercial information necessary to make the employment decision. The only information restrained was information not lawfully relevant to the proposed commercial transaction.

Finally, in both *Press I* and the instant appeal, we are concerned with the right of the newspaper to publish the information. There is obviously no greater right derived by the newspaper to communicate the expressions of a potential employe than its right to disseminate the needs of a potential employer. I am therefore of the view that the employe's rights of freedom of expression under the first amendment have not been abridged by the state's legitimate exercise of its police power in an attempt to eradicate one of the most pervasive and elusive evils in our society today.

APPENDIX D

TEXT OF PERTINENT PROVISIONS OF §5 OF THE PENNSYLVANIA HUMAN RELATIONS ACT, 43 P.S. §955

It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such association or corporation or except where upon applicable security regulations established by the United States or the Commonwealth of Pennsylvania:

(a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin, or non-job related handicap or disability of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the *best able and most competent* to perform the services required. The provision of this paragraph shall not apply to (1) termination of employment because of the terms or conditions of any bona fide retirement or pension plan, (2) operation of the terms or conditions of any bona fide retirement or pension plan which have the effect of a minimum service requirement, (3) operation of the terms or conditions of any bona fide group or employe insurance plan.

(b) For any person, whether or not an employer, employment agency, labor organization or employe, to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, or to obstruct or prevent any person from complying with the provisions of this act or any order issued thereunder, or to attempt, directly or indirectly, to commit any act declared by this section to be unlawful discriminatory practice.

In the Supreme Court of the United States

No. 78-1657
Spring Term, 1979

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA HUMAN RELATIONS
COMMISSION,
Petitioner

vs.

PITTSBURGH PRESS COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

Brief For Respondent In Opposition

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Does a "Situation-Wanted" newspaper advertisement which identifies personal qualifications and characteristics of the advertiser constitute speech protected by the First Amendment to the United States Constitution?

2. Does a state statute which prohibits individual advertisers who seek employment from publishing or causing to be published advertisements which "in any manner express" their race, color, religious creed, ancestry, age, sex or national origin constitute an impermissible prior restraint on protected speech?

3. Did the Pennsylvania Supreme Court correctly balance the First Amendment rights of individuals who seek employment through situation-wanted advertisements against the interest of the state government in prohibiting employment discrimination?

COUNTERSTATEMENT OF THE CASE

The Pennsylvania Human Relations Commission has petitioned for review of the opinion and order of the Pennsylvania Supreme Court of January 24, 1979 affirming a unanimous decision of the Commonwealth Court of Pennsylvania which declared unconstitutional that portion of Section 5(g) of the Pennsylvania Human Relations Act which prohibits the publication of advertisements for employment which express the race, color, religious creed, ancestry, age, sex or national origin of the advertiser. 43 P.S. §955(g). The Pittsburgh Press had been charged with aiding and abetting the advertisers in violation of Section 5(g) by printing "situation-wanted" advertisements in its Classified Advertisement pages. 43 P.S. §955(e).

The "Situation-Wanted" classification is a section in which persons seeking employment describe themselves and/or the type of job which they are seeking and is printed as a public service to individuals seeking employment and to prospective employers. The Press accepts and publishes the information as submitted by the advertiser. It does not maintain sex-based headings or any other discriminatory headings or make any change in the content of the advertisements.

On June 27, 1975 the Pennsylvania Human Relations Commission issued a final order requiring the Press to cease and desist from publishing "situation-wanted" advertisements in which an individual specifies or in any manner expresses his race, color, religious creed, ancestry, age, sex or national origin. The Commission recognized that the Press takes no part in the wording of the advertisements, but found offensive the individual advertiser's personal references. Examples of advertisements objected to by the Commission did not state discriminatory preferences, but only indicated the advertiser's sex, race, religion or age.

The Pennsylvania Commonwealth Court, by its unanimous opinion of July 21, 1977, reversed the Commission's Order. The Court held that Section 5(g) of the Pennsylvania Human Relations Act violated the First Amendment by prohibiting the free flow of legitimate commercial speech without furthering the Commonwealth's interest in eradicating employment discrimination.

The Pennsylvania Supreme Court, by opinion and order filed January 24, 1979, affirmed the order of the Commonwealth Court, finding that the prior restraint of Section 5(g) of the Act was not necessary to promote the state interest involved. The Court held that the restriction imposed by Section 5(g) went beyond that which has been permitted by this Court in the regulation of commercial speech since it went directly to the content of the advertisements and since the advertisements themselves do not promote illegal transactions.

Petitioner has petitioned this Court for writ of certiorari to the Supreme Court of Pennsylvania.

REASONS FOR DENYING THE WRIT

A. "Situation-Wanted" newspaper advertisements which identify personal qualifications and characteristics of the advertisers are protected by the First Amendment to the United States Constitution.

The Pennsylvania Supreme Court has properly applied the "commercial speech" doctrine evolved by this Court and has properly concluded that situation-wanted advertisements are protected by the First Amendment. The decisions of this Court have substantially eroded the commercial speech doctrine propounded in *Valentine v. Chrestensen*, 316 U.S. 52 (1942) which held that speech was unprotected if it proposed a commercial transaction rather than communicating an idea. That erosion culminated in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) in which the Court held that commercial speech is not totally outside the protection of the First Amendment no matter how mundane its subject matter.

The information sought to be suppressed by Section 5(g) of the Pennsylvania Human Relations Act is communication of an individual's identity and qualifications for employment. While the advertisements are commercial to the extent that they propose commercial transactions, the speech is a fundamental individual expression of identity the suppression of which has never been tolerated by this Court. The commercial transaction sought is the securing of employment, the most important commercial endeavor of an individual's life.

Although the Order of the Pennsylvania Human Relations Commission in this case applies only to classified situation-wanted advertisements in a newspaper, Section 5(g) of the Act makes no such distinction and carries no such

limitation. It applies to "any advertisement". Thus, it would apply equally to other types of newspaper advertising as well as to billboards, posters, bumper stickers, mailed circulars, and professional newsletters that carry biographical information about job-seeking individuals. Even individual mailings advertising the proscribed information would be placed in jeopardy. It is inconceivable that such a ban could be held to be constitutional.

Petitioner here argues that the situation-wanted advertisements fall into a category of commercial speech which was found to be outside of First Amendment protection in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) (hereinafter "*Press I*"). That category of speech consists of advertising which proposes an illegal transaction. In that case this Court upheld an ordinance forbidding newspapers to publish help-wanted advertisements in sex-designated columns. In *Press I* the Court found that the Press actively assisted employers in publishing their employment preferences by maintaining the sex-designated columns and by encouraging advertisers to place their advertisements under particular headings. The Press did not challenge that portion of the ordinance which prohibited the publication of discriminatory employment preferences. The Court had only to decide whether the maintenance of sex-designated columns by the Press aided and abetted that illegal advertisement. In this case, the Press challenged the constitutionality of the statute which prohibits expression of one's own personal characteristics. Therefore, the "illegality" argument of *Press I* is not controlling.

The Pennsylvania Supreme Court properly distinguished this case from *Press I*, holding that the "illegality" test did not apply.

> "In contrast to the advertising employer's illegal, sex-based, employment discrimination in Press I, in the

instant case the advertisers are prospective employees proposing commercial transactions—their own employment—which are not illegal. By its terms, the Act applies to employers, and those who aid and abet employers to practice employment discrimination. . . . In the present case the "situation wanted" ads propose no illegal transactions, they simply ask that prospective employers hire the respective individual advertisers." A. 37a-38a

In its holding the Pennsylvania Supreme Court recognized the fundamental difference between this case and *Press I*. The Act prohibits discrimination by employers. To that aim, it prohibits the publication of unlawful discriminatory preference by employers. The Act does not regulate individuals in their selection of employment. It is not illegal to publish one's own personal identity and characteristics. Therefore, that publication cannot be part of the "illegality" theory of *Press I* which would remove the publications from First Amendment protection. No illegal transaction is proposed.

The decisions of this Court which have continued to broaden the protections afforded commercial speech would not permit restraints on an individual's expression of personal identity published by a newspaper as part of the advertiser's legitimate quest to obtain employment. The Pennsylvania Supreme Court properly applied the doctrine of this Court. Further review should not be granted.

B. **A state statute which prohibits individual advertisers who seek employment from publishing advertisements which "in any manner express" their race, color, religious creed, ancestry, age, sex or national origin constitutes an impermissible prior restraint on protected speech.**

Petitioner contends that Section 5(g) is not an unconstitutional prior restraint of unprotected speech because it

would merely replace the prohibited language in the advertisements with that which has been cleansed of references to race, sex, religion, age or ancestry. Petitoner further contends that the absence of summary contempt power eliminates any unconstitutional restraint on protected speech. Petitioner misapprehends the prior restraint concept.

This Court has stricken vague and overbroad statutes which would inhibit the cautious speaker from engaging in protected speech. *Smith v. California*, 361 U.S. 147 (1959); *Near v. Minnesota*, 283 U.S. 697 (1931). The chilling effect on protected speech has been enough to invalidate restrictive statutes. The doctrine has been extended into the commercial speech area as that form of speech has acquired greater First Amendment protection. In *Press I*, *supra* at 390, the Court specified that the ordinance in question did not create a prior restraint only because it outlawed a "continuing course of repetitive conduct," *i.e.*, the publication of sex-designated columns. In the present case, the contents of the advertisements would have to be constantly and carefully censored to eliminate the allegedly offensive language. That censoring would undoubtedly chill protected speech by requiring such subtle determinations as whether publication of one's name would offend the law by revealing one's sex. Excessive caution would inevitably be exercised since offensive language is often indistinguishable from the legitimate.

In another commercial speech decision, *Bigelow v. Virginia*, 421 U.S. 809, 828 (1975) this Court held that imposing a prior restraint on a newspaper by controlling the content of its advertisements is particularly offensive to the First Amendment.

> "The strength of appellant's interest was augmented by the fact that the statute was applied against him as publisher and editor of a newspaper, not against the advertiser or a referral agency or a practitioner. The

prosecution thus incurred more serious First Amendment overtones."

Petitioner's argument concerning the absence of summary contempt proceedings for violation of the Commission's Order mocks the prior restraint principle. The self-imposed censorship which constitutes an unconstitutional prior restraint of expression is not affected by the justice of the contempt proceeding nor by the availability of judicial review. So long as a fear of penalty chills free expression, there is a prior restraint.

Petitioner argues that in order for the interest of the Commonwealth to be served, the information conveyed in the advertisements must be stopped at its source since the reaction to that information by potential employers cannot be measured. (Petition at p. 19-21) That argument in itself raises the spectre of prior restraint. Since some information may be used unlawfully, all information will be suppressed. This prior restraint would not be created merely by a chilling effect, but by statutory design.

Petitioner's reference to the Court's note in *Virginia Pharmacy Board, supra* at 771-72, n. 24, which was quoted in *Bates v. State Bar of Arizona*, 433 U.S. 350, 380-81 (1977) is inapposite to the case sub judice. In those cases, the Court noted the durability of commercial speech and reasoned that a prior restraint may not unduly inhibit protected speech in the advertising context for the reason that the truth concerning the product is known by the advertiser and he can easily make the determination whether an advertisement is protected. That reasoning does not apply here. The situation-wanted advertisements were not outlawed for containing false or misleading information but rather because of the reactions it was *assumed* would be made by those who read the advertisements. The advertiser seeks to publish factual information about himself. That factual information will

communicate essential job qualifications and will enable the prospective employer to contact him. Information as fundamental as the advertiser's name may offend Section 5(g) by relating the individual's sex or national origin. Indicating years of experience in an occupation or date of college graduation may indicate age. The advertising is not durable as that term was used in *Virginia Pharmacy Board, supra,* where virtually every element of the advertisement is subject to scrutiny by the Commission and where the truth of the advertisement is of no defense. The careful editing which would be required to cleanse an advertisement may well discourage an advertiser from submitting an advertisement or a newspaper from maintaining the column.

Section 5(g) and the enforcing Order of the Pennsylvania Human Relations Commission represented the sort of prior restraint of free expression which has never been condoned by this Court. The subtleties of the law and the guesswork required to edit an advertisement to conform to the Commission's interpretation of the law present a most effective framework for self-censorship which go far beyond the chilling effect which has been held adequate to lead this Court to strike a restrictive statute. The Pennsylvania Supreme Court properly interpreted the decisions of this Court in striking Section 5(g) of the Pennsylvania Human Relations Act.

C. The Pennsylvania Supreme Court correctly balanced the First Amendment rights of individuals who seek employment through situation-wanted advertisements against the interest of the state government in prohibiting employment discrimination.

The Pennsylvania Supreme Court correctly applied the balancing test developed by this Court to determine the constitutionality of a regulation of commercial speech. *Bigelow v. Virginia, supra* at 826. The court reasoned that knowledge

of the forbidden criteria of which advertisements would be purged by Section 5(g) could be readily obtained by the employer by scheduling a pre-employment interview or by requesting submission of an employment resume. Infringement on the freedom to publish those characteristics for legitimate purposes is not justified where the effect on the goal of equal employment opportunity is merely speculative and the restrictive statute is so easily circumvented. The court held:

> Any effect that enforcement of Section 5(g) might have on reducing employment discrimination made illegal by Section 5(e) is thus too speculative to justify Section 5(g)'s direct restriction on the advertiser's freedom of expression. A.38a

The Pennsylvania Supreme Court applied the correct test to Section 5(g) and applied it in a manner consistent with recent applications by this Court. The balance was similar to that derived in *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, (1977) in which the Court declared unconstitutional a township ordinance prohibiting the posting of "For Sale" signs in an effort to stem white flight from residential communities and promote racial integration. The Court found the relationship too speculative to justify suppression of speech. As in the present case, the relationship between the speech and the state interest rested on the substantial assumption that those who received the information would act on it in a certain undesirable way. This Court held in *Linmark, supra* at 92, n. 6:

> "After *Virginia Pharmacy Bd. [v. Virginia Consumer Council*, 425 U.S. 748, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976)] it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is 'detrimental.'"

This Court has consistently refused to suppress commercial speech where the relationship to the state's regulatory interest is merely speculative. In *Virginia Pharmacy, supra*, the state argued that the prohibition of advertising prescription drug prices was necessary to maintain the professionalism of its licensed pharmacists. The Court would not interfere with the free flow of truthful commercial information on the basis of speculation that unscrupulous pharmacists could use advertising to cheat the public.

> "The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information." 425 U.S. at 769.

In *Virginia Pharmacy, supra*, the Court noted that the advertising ban would not necessarily prevent pharmacists from cutting corners if they were so inclined. In this case, the employer who wishes to discriminate need only telephone the advertiser, or request an interview or a resume to discover the forbidden criteria. As in *Virginia Pharmacy, supra*, the public interest in the free flow of information outweighs the speculative harm especially where the ban will not eliminate the evil.

Similarly, in *Bates v. State Bar of Arizona, supra*, the Court upheld the right of lawyers to advertise, finding the postulated connection between the advertising ban and the state interest to be "severely strained." 433 U.S. at 368.

Balanced against the unsubstantiated belief of a determental impact upon equal employment opportunity in this case is not only the value of individual expression for its own sake, but the individual's interest in obtaining employment. The newspaper is the only practical means to reach unknown prospective employers. The Pennsylvania Commonwealth Court recognized the "additional element of import" which attaches to advertisements placed to gain employment.

> "We are dealing with the efforts of individuals to sell the only thing that they have to offer: their labor. For the users of the situation wanted column, often the least skilled and most desperate job-seekers, the quest for employment may cause the liveliest political or social controversy of the day to shrink to insignificance by comparison." 31 Pa. Cmwlth. at 230, A. 23a

In the balancing analysis in *Virginia Pharmacy, supra,* the Court reasoned that the advertising ban would harm those it was designed to protect: the poor, the sick and the aged. A proportionately large amount of their income is spent on prescription drugs and yet they are the least able to comparison shop. That same analysis applies in this case. The neutralization of situation-wanted advertisements would prevent minority advertisers from reaching employers who are actively engaged in affirmative action. It is these individuals whom the Pennsylvania Human Relations Act is designed to protect and it is these individuals, often economically disadvantaged, who are most dependent on the newspaper as an inexpensive vehicle for advertising their availability for employment.

The Pennsylvania Supreme Court properly found that the interest of the individual in free expression outweighed the speculative interest of the state. It was a balance consistent with the holdings of this Court. Review by this Court would not affect the state of the law of commercial speech.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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